



Serving the Iowa Legislature

IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

July 12, 2013

2013 Interim No. 2

In This Edition

Calendar	1
Agendas	2
Briefings	3
• Administrative Rules Review Committee (7/9/13)	

Legal Updates

- Iowa's Final Disposition Act
- Telecommunications Company Property Taxation

July 2013

Sun	Mon	Tue	Wed	Thu	Fri	Sat
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

Thursday, July 18, 2013

Service Committee of the Legislative Council

10:00 a.m., Committee Room 22, Statehouse

Studies Committee of the Legislative Council

10:30 a.m., Committee Room 22, Statehouse

Legislative Council

11:00 a.m., Committee Room 22, Statehouse

Tuesday, August 6, 2013

Administrative Rules Review Committee

9:30 a.m., Committee Room 116, Statehouse

August 2013

Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Service Committee of the Legislative Council

Temporary Chairperson: Representative Kraig Paulsen

Temporary Vice Chairperson: Senator Michael Gronstal

Location: Room 22, Statehouse

Date & Time: Thursday, July 18, 2013, 10:00 a.m.

Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566; Richard Johnson, Legal Services, (515) 281-3566.

Agenda: Consider and make recommendations concerning budget and personnel matters of the Legislative Services Agency and the Office of Ombudsman.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=48>

Studies Committee of the Legislative Council

Temporary Chairperson: Representative Kraig Paulsen

Temporary Vice Chairperson: Senator Amanda Ragan

Location: Room 22, Statehouse

Date & Time: Thursday, July 18, 2013, 10:30 a.m.

Legislative Services Agency Contacts: John Pollak, Legal Services, (515) 281-3818; Andrew Ward, Legal Services, (515) 725-2251.

Agenda: Make recommendations for legislative interim studies.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=49>

Legislative Council

Temporary Chairperson: Senator Michael Gronstal

Temporary Vice Chairperson: Representative Kraig Paulsen

Location: Room 22, Statehouse

Date & Time: Thursday, July 18, 2013, 11:00 a.m.

Legislative Services Agency Contacts: Glen Dickinson, Legislative Services Agency, (515) 281-3566; Richard Johnson, Legal Services, (515) 281-3566.

Agenda: Consider reports from Legislative Council committees.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=43>

Administrative Rules Review Committee

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

Location: Room 116, Statehouse

Date & Time: Tuesday, August 6, 2013, 9:30 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53>

BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

ADMINISTRATIVE RULES REVIEW COMMITTEE

July 9, 2013

Chairperson: Representative Dawn Pettengill

Vice Chairperson: Senator Wally Horn

EMERGENCY RULEMAKING APPROVAL, 2013 Iowa Acts, House File 586.

Background. House File 586 requires that all rules filed emergency without notice must be approved by the committee.

Commentary. House File 586 became effective July 1, 2013. Two agencies have emergency adopted rules subject to this provision. At their request these filings were placed on the committee's July agenda, with agency representatives present to answer questions.

Each document cited the grounds for the emergency filing and set out the reasons in support of those grounds. The members discussed both the substance of the rules and the need for an emergency filing. Both requests were unanimously approved by the committee (at least six votes were required). An electronic mail message was later sent to confirm the committee action.

To the extent practicable, these emergency reviews will be held at the committee's monthly meeting. However, if a filing must be in effect prior to a regular meeting, the committee will hold a special telephonic conference to review the filing.

Action. No action taken.

INSURANCE DIVISION, *Regulation of Navigators*, ARC 0816C, 06/26/13 IAB, NOTICE.

Background. The federal Affordable Care Act (ACA) requires state health insurance marketplaces to establish a navigator program that will help individuals who are eligible to purchase coverage through a health insurance marketplace to learn about their new coverage options and enroll. States can award grants to entities that will provide these services. No person may act as a navigator until issued a 3-year Iowa navigator license. Applicants must satisfy various criteria set out in the rule.

Licensees must demonstrate financial responsibility and maintain evidence of financial responsibility in the form of a surety bond or other alternative financial responsibility instrument that protects individuals and entities against wrongful acts, misrepresentations, errors, omissions, or negligence of the navigator, or other violation of insurance law.

Prior to license renewal, individual navigators must complete a minimum of 36 continuing education credits for each continuing education term in courses approved by the Insurance Commissioner on subjects relevant to navigators.

Commentary. Committee members posed many questions as to who can become a navigator, how navigators are selected, and what navigators will do. A representative from the division explained that navigators are selected by the federal government through an application process, and are then subject to state approval. Any individual or entity that applies could potentially be a navigator. The federal government will announce its selections on August 15. Navigators are funded through federal grants. Navigators must be impartial; they can provide the public with guidance on obtaining qualified insurance under the ACA, but cannot encourage the selection of one plan over another. Public comment was received from various advocacy groups seeking guidance on how they might provide assistance regarding the ACA without serving as navigators or violating these rules and seeking more clarity regarding the role of navigators. The division representative explained that such groups could still provide assistance regarding the ACA under these rules without serving as navigators.

Action. No action taken.

PHARMACY BOARD, *Temporary Listing of Substances Subject to Schedule I*, APPROVAL OF EMERGENCY RULEMAKING.

Background. The amendment temporarily classifies as Schedule I controlled substances three synthetic cannabinoids in conformance with recent control of these same substances by the federal Drug Enforcement Administration. The substances have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and lack accepted safety for use under medical supervision. If the General Assembly does not enact this classification by statute in the 2014 regular session, this classification will be nullified 60 days after the session convenes.

Commentary. This was the committee's first approval of an emergency rule in accordance with newly enacted 2013 Iowa Acts, HF 586. A representative from the board explained the process by which the board made these classifications in conformity with federal law, and how they are subject to legislative approval within 60 days of the beginning of the next regular session of the General Assembly. The director of the Governor's Office of Drug Control Policy and a

BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

(Administrative Rules Review Committee continued from Page 3)

parent who lost her child to these substances both expressed support for this rulemaking. The committee approved the emergency filing and moved to refer this rule to the General Assembly to ensure that action is taken within the 60-day deadline.

Action. Emergency rulemaking was approved. General referral to the General Assembly was made.

HUMAN SERVICES DEPARTMENT, *Exemption of Counties from Joining into Regions to Administer Mental Health and Disability Services*, ARC 0735C, 05/15/13 IAB, SPECIAL REVIEW.

Background. This rulemaking established criteria for exempting counties from joining into regions to administer mental health and disability services. The department is charged with implementing redesign of the mental health and disability services system into a regionally administered, locally delivered service system. The authority to accept applications for an exemption was repealed effective July 1, 2013. Counties had to voluntarily form regions by April 1, 2013, or submit a letter of intent by May 1, 2013, to apply for an exemption from forming into a region of at least three contiguous counties. The department received public comments from county representatives asserting the criteria are unworkable, too restrictive, and beyond the scope of the underlying legislation, 2012 Iowa Acts, Chapter 1120 (SF 2315). The department contended these comments are based on confusion regarding SF 2315, and that it is acting within its statutory authority.

Commentary. Discussion centered on the department's recent denial of Jefferson County's application for an exemption. Carroll County was also denied, while Polk County was approved. Jefferson County is currently appealing its denial. No other counties applied for an exemption. Public comment was heard from a member of the Jefferson County Board of Supervisors, who argued that the timeline and criteria for counties seeking an exemption was unfair. He noted that Jefferson County had only been given 48 hours to revise its application in response to feedback from the department, and the department found that it would be unworkable for Jefferson County to join a region, yet denied it an exemption, which will force it to join a region. He argued it would be more fair to allow counties a year to demonstrate that they could meet the exemption criteria, as regions are given one year to meet those same criteria to demonstrate their effectiveness in providing required services. Additional public comment was received asserting the department's criteria exceeded what was provided in statute. A department representative explained the denial of Jefferson County's application and asserted that the department had complied with all statutory requirements. The department's finding that it would be unworkable for Jefferson County to join a region was applied to all counties because SF 2315 did not set out any objective criteria for determining unworkability. The representative noted that Jefferson County will still be able to pursue a remedy through the appeal process.

Action. No action taken.

HUMAN SERVICES DEPARTMENT, *Nursing Facilities—Reimbursement, Cost Reports*, ARC 0789C, 06/12/13 IAB, NOTICE.

Background. These amendments detail the department's treatment of nursing facility legal, accounting, consulting, and other professional fees, including association dues, management fees, penalties and fines, and therapy expenses. These amendments change what is required to be submitted to the department with the cost report.

Commentary. Stakeholders urged that the rules should require greater detail explaining trade association dues and on legal fees associated with patient care lawsuits and state fines. Currently, those costs are combined along with unrelated consulting fees and accounting fees, and reported to the state as one sum. Stakeholders contended that since these items are used to determine Medicaid reimbursement rates the fees should be subject to greater public scrutiny. They also stated that the single sum report makes it impossible to determine whether the individual fees meet the legal standard of being "reasonable."

Facility representatives responded that the item is a small part of the overall expense report. Department representatives noted that legal fees are included only when the facility prevails in the hearing.

Action. No action taken. Additional review is expected after final adoption.

VOTER REGISTRATION COMMISSION, *Voter registration forms*, ARC 0807C, 06/26/13 IAB, EMERGENCY.

Background. This emergency filing specifies the official Iowa voter registration application form.

Commentary. Discussion revealed that the filing did not comply with the specific requirements of Iowa Code §48.11 and was unclear. Stakeholders opposed the emergency filing of these changes and contended that the form could confuse applicants and discourage registration. Commission representatives noted the form could be improved and agreed to rewrite the text.

BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

(Administrative Rules Review Committee continued from Page 4)

Action. No action taken.

Next Meeting. The next regular committee meeting will be held in Room 116, on Tuesday, August 6, 2013, beginning at 9:30 a.m.

Secretary ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <https://www.legis.iowa.gov/Schedules/committee.aspx?GA=85&CID=53>

LEGAL UPDATES

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—IOWA'S FINAL DISPOSITION ACT

Filed by the Iowa Supreme Court
February 22, 2013

In the Matter of the Estate of Mary Florence Whalen, Deceased.

Michael Whalen, Appellant.

No. 12-1927, 827 N.W.2d 184 (Iowa 2013)

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20130222/12-1927.pdf

Rehearing denied March 8, 2013

Factual Background. Decedent Mary Florence Whalen (Flo) and appellant Michael Whalen (Michael) were married in 1952 and moved from Anamosa, Iowa, to Montana, where they lived together for 43 years and raised 10 children. In 1996, Michael and Flo separated, and Michael moved back to Anamosa, Iowa. Michael and Flo never divorced or legally separated. In 2004, Flo moved to Santa Fe, New Mexico, where one of her daughters lived.

In 2009, Flo lawfully executed her last will and testament in New Mexico, naming her sister Mary Ann as her personal representative and executor, and providing specific instructions for her funeral and the burial of her remains in Montana. She purchased a burial plot there and a casket and expressed her desire to be buried in Montana in conversations and correspondence with her children, sister, and husband.

In December 2011, while visiting in Iowa, Flo became ill and was unable to return to New Mexico. She lived with Michael at his house in Anamosa until her death six months later. While living in Iowa, Flo wrote a letter to Michael, Mary Ann, and all of her children reiterating her desire to be buried in Montana.

After Flo's death, Mary Ann asked the funeral director to have Flo's remains transported to Montana. Michael directed that her remains be buried in Anamosa. The funeral director agreed to keep Flo's remains in Anamosa, pending a final court order.

Procedural Background.

District Probate Court. In June 2012, the Jones County probate court admitted Flo's will to probate and appointed Mary Ann as executor of the estate. Mary Ann moved for an order directing that Flo's remains be transported to Billings, Montana, as provided in her will. Michael opposed Mary Ann's motion and requested a ruling that he, as Flo's surviving spouse, had the right to control the final disposition of Flo's remains under the plain language of Iowa Code §144C.5 of Iowa's Final Disposition Act.

The probate court held an evidentiary hearing and on October 30, 2012, ruled against Michael, concluding that the right to control disposition of a decedent's physical remains "devolves upon" a person delineated in Iowa Code §144C.5 only if the decision has not been made by the decedent. In this case the evidence "convincingly" establishes that Flo made the decision to be buried in Montana and did not intend for anyone else to make that decision for her. The probate court ordered that Flo's remains be transported to Montana in accordance with the directions given in her

BRIEFINGS

INFORMATION REGARDING RECENT ACTIVITIES

will.

(Legal Update—Iowa's Final Disposition Act continued from Page 5)

Iowa Supreme Court—Issues on Appeal.

1. Whether Iowa's Final Disposition Act (Act) allows a surviving spouse to disregard the decedent's last will and testament directing disposition of her bodily remains or leaves intact a decedent's common law right to decide where to be buried.
2. Whether, even if the Act preempts the common law, Flo's last will and testament effectively serves as a declaration under the Act designating her sister to decide her burial location.

Analysis and Holding.

Iowa's Final Disposition Act Preempts Common Law. In a 5-2 decision, the Iowa Supreme Court (Court) held that under the express terms of Iowa Code §144C.5, Michael, as the surviving spouse, had the right to control disposition of the decedent's remains in the absence of a declaration designating someone else. The Court concluded that it does not need to decide Flo's rights under common law because Iowa Code chapter 144C preempts any conflicting common law.

The Court observed that Iowa Code §144C.3 provides that a declaration "shall name a designee who shall have the sole responsibility and discretion for making decisions concerning the final disposition of the declarant's remains" but "shall not include directives for final disposition of the declarant's remains" or "arrangements for ceremonies planned after the declarant's death".

The Court considered the history of the Act, which was effective on July 1, 2008, and applies to all deaths occurring and to declarations executed, on or after that date. The Court observed that the Act is comprehensive and detailed and is cross-referenced in other statutes regulating the handling of human remains. Specifically, Iowa Code §523I.309 of the Iowa Cemetery Act was amended to eliminate a provision that previously allowed a person like Flo to provide written directions for the interment of her remains in a written instrument such as a will and required a surviving spouse to carry out such directions.

The Court found that the drafting history of the Act, including a comparison of the bill originally introduced with that of the legislation enacted, also shows that the Legislature decided against requiring survivors to follow the written instructions of the decedent beyond the choice of a designee. The Court concluded that the Legislature made a deliberate policy choice to favor clarity and certainty over the ability of persons to control the final disposition of their own bodies. The Court held that the Act displaces any common law right requiring a surviving spouse to follow the decedent's instructions upon burial.

The Decedent's Will is not an Effective Declaration of a Designee under the Act. The Court found that even though the decedent's last will and testament satisfies the formal execution requirements for a declaration of a designee, the will does not comply with the written form required by the Act and was not attached to a durable power of attorney for health care under Iowa Code chapter 144B, also required by the Act. The Court stated that it cannot eliminate the requirements of the law or ignore the fact that the will includes burial instructions a statutory declaration is forbidden to contain.

Holding. For the above reasons, the Court held that the probate court erred in concluding that the decedent's wishes overcame her surviving husband's right to control disposition of her remains under the Act. The probate court order was reversed and the case remanded for an order allowing Michael to direct burial of Flo's remains.

Dissent. The dissent would uphold the decision of the probate court. The dissent opined that the Legislature intended the Act to designate and empower a line of authority to make decisions pertaining to arrangements for a funeral and final disposition of the remains of a person who has died, but did not intend to replace the "timeless and fundamental ability of people to otherwise make these decisions for themselves and preserve them in their last will and testament." The Court stated that the Act is independent of the autonomy of a person to make such decisions prior to death and that the intent of the Act is only to resolve disputes that occur when a decedent leaves no directions behind, not to deprive decedents of the right to make such decisions.

The dissent opined that the Legislature did not intend to deprive a testator of the right of self-determination by requiring testators to designate a person to make these personal determinations after death without the ability to provide any direction. The dissent expressed confidence that the Legislature did not intend the result espoused by the majority of rendering "future generations of Iowans powerless to direct for themselves their funeral arrangements and final disposition of their remains."

LSA Monitor: Ann Ver Heul, Legal Services, (515) 281-3837.

LEGAL UPDATE—TELECOMMUNICATIONS COMPANY PROPERTY TAXATION

Filed by the Iowa Supreme Court

April 12, 2013

Qwest Corporation v. Iowa State Board of Tax Review

No. 11-1543, 829 N.W.2d 550 (2013)

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20130412/11-1543.pdf

Background and Procedure. The federal Telecommunications Act of 1996 and state legislation in Iowa was enacted to enhance the availability of telecommunications services and encourage competition following a period of years where the monopoly conditions of the telecommunications industry were deconstructed. As part of House File 518, enacted by the General Assembly in 1995, telecommunications companies that are classified as competitive long distance telephone companies (CLDTCs) are no longer subject to property tax on switches, computers, equipment, and other personal property that was first assessed for taxation in Iowa on or after January 1, 1996. However, such exemption was not extended to incumbent local exchange carriers (ILECs), including Qwest Corporation (Qwest). In addition, wireless telecommunications companies are not subject to tax on such personal property because they are not considered to be a telephone company “operating a line in this state,” within the meaning of Iowa Code §433.1. Wireless telecommunications companies are instead assessed locally for the value of their cell towers and other real property.

Qwest responded to its 2006 assessment by filing a protest with the Iowa State Board of Tax Review. An agreement between the parties reduced the total assessed value, but Qwest preserved its constitutional arguments. The case was transferred to the Department of Inspections and Appeals for a contested case hearing. The administrative law judge’s decision that the differential tax system was constitutional was affirmed by the State Board of Tax Review. On appeal to district court, however, the court found that the tax scheme allowing a tax exemption for the personal property of CLDTCs and wireless providers but not for the substantially similar switching and central office equipment property of Qwest violates the Iowa Constitution’s Equal Protection Clause, as applied to Qwest.

Issue. Qwest asserts that disparate tax treatment of the personal property of ILECs, as compared to the tax treatment of the personal property of CLDTCs and wireless providers, violates the Equal Protection Clause of the Iowa Constitution.

Arguments and Analysis. Economic legislation, such as the tax provisions at issue in this case, are reviewed under the rational basis test. To survive constitutional scrutiny, the statute need only be rationally related to a legitimate state interest and most tax laws are generally upheld without much difficulty.

The Iowa Supreme Court (Court), without extensive analysis, made the assumption that the groups of telephone companies at issue in this case are “similarly situated” and proceeded to its rational basis analysis. The Court agreed with the State Board of Tax Review’s conclusion that a rational basis exists to exempt the post-January 1, 1995, property of CLDTCs because it was a reasonable way to encourage the deployment of new infrastructure that would foster competitive wireline networks. The Court also rejected the district court’s determination that even if a rational purpose existed at the time the exemption was enacted in 1995, such purpose is no longer rational because of the change in the market dominance of Qwest in the overall telecommunications industry in Iowa. The Court concluded that the wireless telecommunications and wireline telecommunications were not substitutes and acknowledged a continued dominance by Qwest in the wireline telecommunications market. Following a finding in the record that the ILECs retain some vestiges of their former monopoly status, the Court concluded that the continued taxing of ILECs personal property is an appropriate way to address that dominance. In its analysis, the Court distinguished the Court’s decision in *Racing Association of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004), which was relied on heavily by Qwest, and also noted similar results in challenges to similar telecommunications property tax provisions in other states.

Holding. The Court held that the imposition of a tax on the Iowa-based personal property of ILECs, but not on that of CLDTCs, does not violate the equal protection clause of the Iowa Constitution, reversed the decision of the district court, and remanded the case for further proceedings.

LSA Monitor: Michael Duster, Legal Services, (515) 281-4800.